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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section 25 )  
of the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )  
 )  
Direct Broadcast Satellite )  
Public Service Obligations )

MM Docket No. 93-25

To: The Commission

COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

DISCOVERY COMMUNICATIONS, INC.

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Discovery Communications, Inc. ("Discovery"), by its attorneys, hereby submits its comments in the above-referenced proceeding, which seeks to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or the "Act"). Section 25 requires the Commission to promulgate regulations to impose certain restrictions on providers of direct broadcast satellite service, including the application of political broadcasting rules and a requirement to carry a minimum amount of noncommercial programming of an educational or informational nature.

I. Statement of Interest

Discovery owns and operates two national program services -- The Discovery Channel and The Learning Channel ("TLC") -- which are distributed by cable, MMDS, SMATV, and other multiple channel

TLC features educational programming, including a highly-acclaimed six-hour block of noncommercial educational programming designed to prepare children between the ages of 2 and 6 years for school. Discovery anticipates that both program services will be carried by providers of DBS service and, accordingly, has an interest in the outcome of this proceeding.

II. Neither Discovery Nor Its Program Services Should Be Considered Providers of DBS Service for Purposes of the Act

As an initial matter, the Commission seeks to determine which entities will be subject to the obligations imposed by Section 25. Notice of Proposed Rule Making in MM Docket No. 93-25, FCC 93-91 (rel. Mar. 2, 1993) ("NPRM") at ¶ 2. Section 25(a) imposes the political broadcasting requirements of Sections 312(a)(7) (access for federal candidates) and 315 (equal opportunities and lowest-unit charge) of the Communications Act on "providers of direct broadcast satellite service providing video programming," without further elaboration. 1992 Cable Act, §25(a); see also NPRM at ¶ 2. In contrast, Section 25(b) (dealing with non-commercial educational programming requirements) specifically defines a "provider of direct broadcast satellite service" as either "(i) a licensee for a Ku-band satellite system under part 100 of [the Commission's rules]; or (ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming

directly to the home and licensed under part 25 [of the Commission's rules]." 1992 Cable Act, §25(b)(5)(A).

Discovery, although it is not offering comments on the precise parameters of the definition, notes that it (and programmers in general) does not qualify as a provider of DBS service to which Section 25 applies. It is neither a provider of direct broadcast service for purposes of Section 25(a) nor a licensee or distributor for purposes of Section 25(b). Rather, it makes programming available to entities that provide or propose to provide direct broadcast service to consumers. Accordingly, any rules adopted pursuant to this proceeding should not be applied to Discovery or similarly situated entities.

III. The Commission Should Grant Providers of DBS Service Considerable Discretion in Instituting Political Broadcasting Requirements

As noted, Section 25(a) of the 1992 Cable Act requires the Commission to apply the reasonable access requirements of Section 312(a)(7) and the equal opportunities/lowest unit charge provisions of Section 315 of the Communications Act to "providers of direct broadcast satellite service providing video programming." 1992 Cable Act, §25(a).

The Commission. of course. has a long history of overseeing

To date, however, the reasonable access provisions have not been applied in a multiple channel setting. NPRM at ¶ 23.<sup>1</sup> The Commission properly recognizes that the determination of what access is "reasonable" may be different in such an environment. Accordingly, it seeks comment on whether a "DBS provider that controls multiple channels [should] be required to make all video channels available to federal candidates." Id.

In a multi-channel environment such as DBS, the service provider is able to supply subscribers with a wide variety of program services, each offering a different topic or seeking to appeal to a different audience. This "narrowcasting" approach allows one channel to be used exclusively for news and public affairs programming, another for educational programming, a third for movies, and so on. Generally, the multi-channel program distributor (such as a provider of DBS service) will have no direct control over the program content of individual program services carried over the system. Rather, each satellite network is an independent entity in the exercise of editorial control over its programming, thereby increasing the diversity of voices carried by the distributor. In this regard, DBS operators are similar to cable operators and quite unlike conventional broadcast licensees who have editorial responsibility for all of the programming presented over their facilities. There is

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<sup>1</sup> Indeed, the Commission has expressly determined that the reasonable access provisions do not apply to cable operators. Report and Order in MM Docket No. 91-168, 7 FCC Rcd 678, 680 n.11 (1991) ("Codification Order"). That result, of course, is foreclosed here, as Congress has directed that the provisions be applied to providers of DBS service.

nothing in the Act, however, that even suggests that a DBS operator is to be burdened with a pervasive "public trusteeship" for all of the varied program services carried over its system. More significantly, there is absolutely no manifestation in the Act of an intent to displace the editorial discretion of individual programmers.<sup>2</sup>

In applying Section 312(a)(7), the Commission generally relies on the reasonable, good faith judgment of broadcasters to determine the proper parameters of reasonable access.<sup>3</sup> Discovery supports the Commission's proposal to grant DBS service providers similar discretion. NPRM at ¶ 24. Accordingly, given the fundamental structure of the DBS business, and in order to furnish the provider of DBS service equivalent latitude (and recognize the independent editorial role of individual networks), it should be deemed reasonable for a provider of DBS service to supply a candidate with access to the DBS system, taken as a whole, but to deny access to a specific channel or channels (just

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<sup>2</sup> It should be noted that in imposing reasonable access requirements on DBS service providers but not cable operators, Congress implicitly ratified the Commission's prior judgment that they do not apply to cable. If the Commission imposed requirements on DBS that restricted the editorial discretion of DBS program suppliers, however, the Commission could also force a fundamental restructuring of the cable programming business, which, at least today, is essentially composed of the same program services that will provide the nascent DBS service with its programming. Congress, however, chose not to require this restructuring with respect to cable. The Commission should take care not to cause this result indirectly through its DBS rules.

<sup>3</sup> Recently, the Commission decided that, rather than impose strict guidelines to determine what constitutes reasonable access, it would continue to "rely upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates." Codification Order, 7 FCC Rcd at 680-81.

as a broadcaster may deny access to a specific program). Thus, a DBS service provider should be allowed to designate the particular channel or channels that are to be made available for access. In this way, federal candidates will have access to DBS subscribers while the provider of DBS service will retain flexibility to supply those subscribers with diverse programming and programmers will retain their editorial discretion.

With regard to equal opportunities, Discovery supports applying an approach similar to that used with respect to cable television. See NPRM at ¶ 26. Thus, if the DBS provider affords a "use" to one candidate, it will be able to meet its equal opportunities obligation by affording an opposing candidate with access to a channel that has an audience size comparable to that of the channel on which the initial use occurred -- but would not be required to provide access to the same channel on which the initial use occurred. Id. at ¶ 26.

#### IV. Obligation to Carry Noncommercial Educational and Informational Programming

##### A. The Term "National Educational Program Supplier" Should Be Defined to Include Any Entity that Provides Noncommercial Programming of an Educational or Informational Nature

Section 25(b) of the Act requires a provider of DBS service to set aside a portion of its channel capacity "exclusively for noncommercial programming of an educational or informational nature." 1992 Cable Act, §25(b)(1). This requirement is to be met by "making channel capacity available to national educational



programming suppliers." 1992 Cable Act, §25(b)(3). The Commission has sought comment on the scope of the term national educational programming supplier. NPRM at ¶ 43.

Discovery submits that the term should include any entity that provides noncommercial programming of an educational or informational nature. This approach would further the goals of the Act by encouraging all entities to provide the type of programming sought to be promoted by Section 25(b). The type of programmer providing the desired programming should be irrelevant. Indeed, to limit the list of eligible entities to a select few would discourage those excluded from offering this valuable programming.

The programming provided by TLC is a perfect example. TLC currently offers six hours of noncommercial educational programming Monday through Friday. TLC's "Ready, Set, Learn" block, which has been lauded by such entities as the National Education Association, which awarded TLC with its 1993 Award for the Advancement of Learning through Broadcasting, is designed to prepare 2 to 6 year olds for school. "Ready, Set, Learn" teaches reading through the "whole language" method, as well as socialization, conceptualization, arts, and other skills essential for children entering school. The format is lively, engaging and attractive to its target age group. "Ready, Set, Learn" is exactly the type of programming that the Act seeks to promote and a provider of DBS Service should be encouraged to

carry it.<sup>4</sup> Allowing the DBS service provider to satisfy its obligation, at least in part, by carrying "Ready, Set, Learn" would achieve this objective.

The definition of "national educational programming supplier" contained in the Act does not preclude this result. It provides a list of entities that are included in the term, but does not serve to limit the scope of eligible entities. The Commission thus has the discretion to adopt an expansive definition. Public policy dictates that it should do so. An expansive definition will encourage all programmers to offer the type of programming sought to be fostered by the Act. TLC has led the way with its innovative noncommercial programming designed to prepare pre-schoolers for school. The Commission should encourage others to follow. The Commission can achieve this result by promulgating a definition of "national educational programming supplier" that includes any entity that provides noncommercial programming of an educational or informational nature.

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<sup>4</sup> The TV Guide Parents' Guide to Children's Entertainment gave "Ready, Set, Learn" an "A" rating, lauding its emphasis on the printed word. See TV Guide Parents' Guide to Children's Entertainment, Summer 1993.

- B. The Provider of DBS Service Should be Allowed to Satisfy Its Obligations by Reserving a Percentage of Its Channel Capacity, Rather

## V. Conclusion

The Commission should implement Section 25 of the 1992 Cable Act by promulgating regulations that give providers of DBS service flexibility in fulfilling their public service obligations. Thus, in imposing political broadcasting rules, the Commission should allow the DBS service provider considerable discretion to determine what constitutes reasonable access.